STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 225017

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Plaintiffs-Appellants,

v.

THE STATE OF MICHIGAN,

Defendant-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Defendants-Appellees.

Supreme Court Docket No. 122830

Court of Appeals Docket No. 225017

Ingham County Circuit Court
Case No. 99-90195-CZ

BRIEF ON APPEAL – INTERVENING APPELLEE GAMING ENTERTAINMENT, LLC

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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COUNTER-STATEMENT OF THE BASIS OF JURISDICTION

Intervening Appellee Gaming Entertainment, LLC ("GE") concurs with TOMAC's statement that this Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2). Jurisdiction also exists under MCL 600.215.

Contrary to TOMAC's assertions, however, the Court of Appeals' decision is correct and should be affirmed because: (1) the Tribal-State Gaming Compacts at issue ("the Compacts") are not "legislation" and therefore the Michigan Legislature did not violate Const 1963, art 4, § 22 when it approved them by concurrent resolution; (2) the Compacts are neither "legislation" nor local in nature and therefore do not violate the local acts provision of the Michigan Constitution, Const 1963, art 4, § 29; and (3) the Compacts do not delegate legislative power to the Governor and therefore do not violate the separation of powers clause, Const 1963, art 3, § 2.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. MAY THE LEGISLATURE EXERCISE ITS PLENARY POWERS BY APPROVING A TRIBAL-STATE GAMING COMPACT, WHICH DELINEATES THE RELATIONSHIP BETWEEN TWO SOVEREIGN POWERS, BY CONCURRENT RESOLUTION, AND NOT BY LEGISLATION, WITHOUT VIOLATING THE MICHIGAN CONSTITUTION'S REQUIREMENT, CONST 1963, ART IV, § 22, THAT ALL LEGISLATION BE ENACTED BY BILL?

The Court of Appeals says, "Yes."

The trial court says, "No."

Plaintiffs/Appellants Taxpayers of Michigan Against Casinos and Laura Baird say, "No."

Defendant/Appellee the State of Michigan says, "Yes."

Intervening Defendant/Appellee Gaming Entertainment, LLC says, "Yes."

II. DOES THE LEGISLATURE'S APPROVAL OF THE COMPACTS BY RESOLUTION VIOLATE THE LOCAL ACTS PROVISION OF THE MICHIGAN CONSTITUTION, CONST 1963, ART IV, § 29, WHEN THE COMPACTS ARE NEITHER LEGISLATION NOR LOCAL IN NATURE?

The Court of Appeals says, "No."

The trial court says, "No."

Plaintiffs/Appellants Taxpayers of Michigan Against Casinos and Laura Baird say, "Yes."

Defendant/Appellee the State of Michigan says, "No."

Intervening Defendant/Appellee Gaming Entertainment, LLC says, "No."

III. DO THE COMPACTS APPROVED BY THE LEGISLATURE AND SIGNED BY THE GOVERNOR VIOLATE THE SEPARATION OF POWERS PROVISION OF THE MICHIGAN CONSTITUTION, CONST 1963, ART III, § 2, BY PERMITTING THE GOVERNOR TO AGREE TO AMENDMENTS TO THE COMPACTS WHERE THE COMPACTS ARE NOT LEGISLATION BUT RATHER ARE AGREEMENTS BETWEEN TWO SOVEREIGN ENTITIES?

The Court of Appeals declined to address this issue.

The trial court says, "Yes."

Plaintiffs/Appellants Taxpayers of Michigan Against Casinos and Laura Baird say, "Yes."

Defendant/Appellee the State of Michigan says, "No."

Intervening Defendant/Appellee Gaming Entertainment, LLC says, "No."

COUNTER-STATEMENT OF FACTS[1]

I. CONCISE STATEMENT OF MATERIAL FACTS

A. The Indian Gaming Regulatory Act

Nine federally recognized and sovereign Indian tribes in Michigan currently operate casino gaming facilities that provide thousands of jobs and generate hundreds of millions of dollars in revenue for tribal and local governments, as well as revenue to the Michigan Strategic Fund. In this case, TOMAC challenges the Legislature's method of concurrence in four Indian gaming compacts (the "Compacts") negotiated between and signed by then Governor John Engler and four Indian tribes (collectively, the "Tribes"),[2] and approved by the Michigan Legislature by concurrent resolution in 1998. The Tribes and the State of Michigan (the "State") negotiated and entered into the Compacts according to the requirements of the federal Indian Gaming Regulatory Act, 25 USC 2701 *et seq.* ("IGRA").[3]

IGRA provides a comprehensive scheme for the authorization, operation, and regulation of gaming activities on Indian lands, and divides tribal gaming into three classes. Class I

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[1] Intervening Appellee Gaming Entertainment, LLC ("GE") respectfully submits that the statement of facts provided by Appellants Taxpayers of Michigan Against Casinos and Laura Baird (collectively, "TOMAC") contains omissions and inaccuracies. Accordingly, GE provides this counter-statement of facts pursuant to MCR 7.212(C)(6).

[2] These tribes are the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi Indians.

[3] Congress enacted IGRA in 1988 pursuant to the Indian Commerce Clause, US Const, art I, § 8, cl 3, which grants the federal government exclusive jurisdiction over relations with Indian tribes. As is more fully explained in the State's Brief on Appeal, Congress passed IGRA following the decision by the United States Supreme Court in *California v Cabazon Band of Indians*, 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987). In *Cabazon*, the Court had declared that state law is inapplicable to Indian gaming on Indian lands, and a state may not prohibit Indian gaming where the state's own gaming policy merely regulates, and does not prohibit, gaming generally. *Id.* at 211, 214.

gaming, which includes social games played for prizes of minimal value or traditional ceremonial games, is left to the tribe's exclusive control. 25 USC 2703(6). Class II gaming, which generally consists of bingo and other similar games, is regulated by both the tribes and the federal government. 25 USC 2703(7). Class III gaming, which consists of casino-style gaming, including table games and slot machines, is regulated in all cases by the federal government and the tribes. 25 USC 2703(8). Class III gaming also may be regulated by the state – but only if the tribes agree to state regulation and the state acts to extend its regulatory jurisdiction over the tribal gaming. 25 USC 2710(d)(3).

The Compacts at issue here deal with Class III gaming. Pursuant to IGRA, Class III gaming activities are lawful on Indian lands if the gaming activities are: (1) properly authorized by the Indian tribe; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity;" and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 USC 2710(d)(1). It is through the compacting process that a tribe and a state may choose to extend or not extend some or all of the state's authority over tribal gaming. 25 USC 2710(d)(3)(C). IGRA does not specify the manner in which the State must approve of a tribal-state compact, but requires that the State "negotiate with [an] Indian tribe in good faith to enter into such a compact" if a tribe seeks to engage in Class III gaming. 25 USC 2710(d)(3)(A). As enacted, IGRA also provides an enforcement mechanism to allow for tribal gaming in the event that a state flouts the legal mandate to negotiate in good faith with a tribe. 25 USC 2710(d)(7).

B. Indian Gaming in Michigan

Prior to IGRA's passage, several Indian tribes operated casino gaming establishments on their lands in Michigan. *Sault Ste Marie Tribe of Chippewa Indians v Michigan*, 800 F Supp

1484, 1486 (WD Mich 1992) ("*Sault Ste Marie Tribe I*"). After IGRA was passed, those tribes "contacted then Governor Blanchard ... and requested that the state enter into negotiations for a Tribal-State gaming compact." *Id.* Negotiations subsequently broke down over the issue of "whether electronic or electromechanical facsimiles of games of chance (video games) could properly be [included in] the compact," and the tribes instituted a suit against the State to compel negotiations.[4] *Id.* During the pendency of that suit, the Michigan Court of Appeals decided, in *Primages International of Michigan v Liquor Control Comm*, 199 Mich App 252; 501 NW2d 268 (1993), that video draw poker machines were not illegal gaming devices under MCL 750.303, thus concluding that the State permits electronic games of chance. After this decision was announced, the tribes and Governor John Engler recommenced negotiations and reached a settlement that included a proposed compact. *Sault Ste Marie Tribe II*, *supra* at 851.

The Consent Judgment crafted by Governor Engler and the tribes stated:

> This Consent Judgment shall become effective and shall bind and obligate all parties hereto only on the express condition that each tribal party and the Governor shall execute a class III gaming compact, which shall be concurred in by resolution of the Michigan Legislature. . . . In the event that any condition described herein does not occur with respect to one or all of the tribes, the dispositive cross motions for dismissal and/or summary judgment filed by the tribes and the Governor in these proceedings shall be placed immediately on the Court's calendar for disposition, and thereafter the case shall proceed to Judgment. (App at 65b).

The Consent Judgment thus did not obligate the Legislature to concur in the 1993 Compacts by resolution, but stated only that such concurrence was one of several conditions precedent to the effectiveness of the Consent Judgment. Soon after the Consent Judgment was entered, the

[4] This action was originally brought against the State. The District Court dismissed the action based upon the Eleventh Amendment immunity of the State, but indicated that it would consider allowing the case to proceed if the tribes amended their complaint to name state officials. *Sault Ste Marie Tribe I*, *supra* at 1490. The tribes subsequently amended their complaint to name then Governor Engler as a defendant. *Sault Ste Marie Tribe v Engler*, 93 F Supp 2d 850, 851 (WD Mich 2000) ("*Sault Ste Marie Tribe II*").

Legislature approved by concurrent resolution tribal-state gaming compacts with the seven Indian tribes that at that time were federally recognized as sovereign governments (collectively, the "1993 Tribes").[5] Pursuant to IGRA and their negotiated compacts, the 1993 Tribes continued Class III gaming operations on their lands.

In 1997 and 1998, Governor Engler, on behalf of the State of Michigan, negotiated tribal-state gaming compacts with four federally recognized tribes that had not been recognized at the time of the 1993 Compacts. It is these compacts that are at issue in this case. Each of the Compacts provided that it would become effective upon fulfillment of four conditions:

1. Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;

2. Endorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature;

3. Approval by the Secretary of the Interior of the United States; and

4. Publication in the Federal Register. Compacts § 11 (App at 45b).

These conditions are identical to those included in the 1993 Compacts. *See Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439, 455-56 n 5; 553 NW2d 7 (1996), *lv den* 453 Mich 866 (1996).

House Concurrent Resolution 115 was introduced as a vehicle for the Legislature to indicate its consent to the Compacts. (TOMAC App at 46a). HCR 115 passed the House of Representatives on December 10, 1998, after hearings on the Resolution were held in the House Committee on Oversight and Ethics. 1998 Journal of the House 2671-2673 (TOMAC App at

[5] These tribes were the Sault Ste. Marie Tribe of Chippewa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, the Keweenaw Bay Indian Community, the Hannahville Indian Community, the Bay Mills Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Saginaw Chippewa Indian Tribe.

75a-77a). The Senate passed HCR 115 and thereby approved the Compacts on December 11, 1998.[6] (App at 68b-73b). HCR 115 received a majority of the votes of the legislators present and voting in each chamber, meeting the necessary threshold established by rules of each house of the Legislature for approval of a concurrent resolution.[7]

After receiving the Legislature's concurrence, the Compacts were forwarded to the Secretary of the Interior of the United States. Because the Secretary did not exercise his authority to disapprove the Compacts, they were deemed approved by operation of law pursuant to 25 USC 2710(d)(8)(C) and became effective on February 18, 1999. *See* 64 Fed Reg 8111 (February 18, 1999). Later in 1999, two of the Tribes, the Little Traverse Band and the Little River Band, commenced Class III gaming operations under IGRA on their lands, and began making payments both to local governments and to the Michigan Strategic Fund. *See* Michigan Gaming Control Board, Tribal Casino Slot Revenue Payments & Slot Information, *available at* http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_27146---,00.html. (App at 106b-107b).[8]

[6] While no hearings on HCR 115 were held in the Senate, the Senate Committee on Gaming and Casino Oversight did hold hearings on a parallel Senate Resolution, SR 71 (1997). (App at 74b-77b).

[7] TOMAC's claim that HCR 115 was earlier "defeated" in the House is wholly inaccurate; the only recorded vote in the House was one of approval, as the voting board never "closed" until that final vote. (TOMAC Brief at 5); 1998 Journal of the House 2671-2673 (TOMAC App at 75a-77a). Furthermore, while it is true that the margin by which HCR 115 passed in the House of Representatives would not have been sufficient to pass a bill, it is pure supposition to claim that additional votes could not have materialized had approval of the Compacts proceeded in a fashion requiring more affirmative votes.

[8] This Court has recognized that it may take judicial notice of information contained in "official government data." *LeRoux v Secretary of State*, 465 Mich 594, 613-14; 640 NW2d 849 (2002). GE respectfully requests that this Court take judicial notice of this document, pursuant to MRE 201(b), in that it is a source of official government data "whose accuracy cannot reasonably be questioned."

On July 22, 2003 (after the trial court and Court of Appeals heard and decided this case, and after TOMAC filed its application for leave to appeal to this Court), Governor Jennifer Granholm signed a proposed amendment to one of the Compacts at issue in this case, the compact with the Little Traverse Bay Bands of Odawa Indians.[9] (TOMAC App at 136a-139a). The amendment was entered into pursuant to the Amendment section of the Compacts, Compacts § 16 (App at 47b-48b), which provides that the Governor "shall act for the State" in receiving and proposing Compact amendments. Such amendments become effective upon agreement of the Governor and the Tribe and approval by the Secretary of the Interior. Compacts § 16(C) (App at 48b). On December 10, 2003, the Secretary of the Interior approved the Compact amendment. (App at 105b).

II. STATEMENT OF PROCEDURAL HISTORY

TOMAC filed this action against the State on June 10, 1999. Count I alleged that the Compacts were invalid under Const 1963, art 4, § 22, because the Legislature approved the Compacts by resolution rather than by bill. In Count II, TOMAC alleged that the Compacts were invalid because they were legislative enactments constituting "local acts" under Const 1963, art 4, § 29. In Count III, TOMAC claimed that the Compacts were invalid because the provision that authorizes the Governor to approve amendments to the Compacts violates the separation of powers clause of the Michigan Constitution, Const 1963, art 3, § 2.[10]

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[9] No amendments have been signed concerning the other three compacts.

[10] TOMAC named only the State of Michigan as a defendant. Because of their interests in the proposed casinos, two of the consultants involved in the development of the proposed casinos, Gaming Entertainment, LLC ("GE") and North American Sports Management Company, Inc. ("NORAM") intervened as party defendants (collectively, the "Intervenors"), pursuant to an order dated September 20, 1999. GE was retained by the Nottawaseppi Huron Band of Potowatomi Indians, and has provided financial and other support in that tribe's efforts to open and operate a casino on its tribal lands. On August 12, 2002, at NORAM's request, the Court of Appeals dismissed NORAM as a party to this action. The Tribes were not made parties to this action.

The Ingham County Circuit Court rendered its decision based upon cross motions for summary disposition. In an Opinion and Order dated January 18, 2000, the trial court held that the Compacts constituted state legislation. (App at 1b-16b).[11] The trial court thus found in favor of TOMAC on Count I (regarding the form of legislative approval of the compacts) and Count III (regarding separation of powers), while rejecting TOMAC's claim under Count II (regarding local acts).

The State and Intervenors appealed the trial court's decision on February 4, 2000. The Court of Appeals issued an Opinion on November 12, 2002. In a unanimous decision, the Court of Appeals reversed the trial court's decision, and found against TOMAC on all counts. (App at 17b-30b). The Court of Appeals concluded that the Compacts are contracts, not legislation, and that the Legislature's concurrence in the Compacts by concurrent resolution was both governed by federal law and consistent with state law. (App at 20b). The Court of Appeals similarly found TOMAC's "local acts" argument to be without merit. (App at 30b). The Court of Appeals also found that TOMAC's separation of powers claim was not ripe for appellate review, since no amendment to any of the Compacts had been requested or approved at that time. (App at 30b).

TOMAC filed an application for leave to appeal to this Court on December 3, 2002. The State of Michigan filed a response on December 23, 2002, and GE filed a response on January 15, 2003. While its application was pending, TOMAC filed a motion for leave to file a supplemental brief in support of its application, requesting that the Court consider the agreement of the Governor and the Little Traverse Bay Bands of Odawa Indians to amend that tribe's

[11] GE has included the opinions of the trial court and the Court of Appeals in its Appendix because portions of these opinions as they appear in TOMAC's Appendix are omitted, perhaps from a copying error.

compact in considering whether to grant TOMAC's application for leave to appeal. Both the State and GE opposed this motion.

On September 25, 2003, this Court granted TOMAC's application for leave to appeal, and also granted TOMAC's motion to file a supplemental brief. This Court directed the parties to "include among the issues briefed whether approval of the state-tribal compacts by concurrent resolution is effective in light of Const 1963, art 4, § 22." (App at 241b).

SUMMARY OF ARGUMENT

Pursuant to the United States Constitution, the people and the states invested the federal government with the power to regulate relations with Indian tribes. US Const, art I, § 8, cl 3. Federal law, through IGRA, provides a comprehensive framework for the regulation of tribal gaming. 25 USC 2701 et seq. This framework allows for state regulation only to the extent that it is negotiated into the terms of a tribal-state compact that sets forth the parameters under which Indian tribes located within the state's borders will establish and operate casino-style gaming facilities. 25 USC 2710(d)(3). Neither IGRA nor principles of federal Indian law supply a state in which gaming is permitted with any ability to unilaterally regulate tribal gaming. Further, while IGRA provides for the negotiation of a tribal-state compact, it does not specify the manner in which a state's Legislature must approve of such a compact. One therefore must look to state law to make this determination.

In Michigan, the Legislature's power is plenary. The Legislature possesses all of the power of the people and may exercise that power in the manner of its choosing, unless a provision of the Michigan Constitution restricts its power to act, or prescribes a particular manner of acting. While the Michigan Constitution provides that "all legislation shall be by bill," this provision does not apply to the Compacts because they are not legislation. The essential hallmark of legislation is the unilateral action of the Legislature in creating rules that

apply to those subject to its power. The Legislature enacts legislation when it uses its unrestricted power to determine the rules of conduct applicable to a certain sphere within its control.

Applying the definition of legislation to this case, it follows that the Compacts are not legislation. The Compacts are not a product of the unilateral action or unrestricted power of the Legislature, but instead result from negotiations between two sovereign entities, the State and the tribe, and through the Compacts the State has not acted to extend its jurisdiction. Additionally, the Compacts are not legislation because they do not apply to the citizens of the State of Michigan or those subject to the State's authority, but rather to the Tribes, which in this context are not subject to the legislative power of the State. To the extent that the Compacts delineate rules of conduct applicable to tribal gaming, they do not do so through the use of the Legislature's unrestricted power, but rather through the affirmative choice of the Tribes. Accordingly, the Compacts are not legislation. (They are more closely analogous to contracts.)

Even applying the overbroad test of legislation that Plaintiffs/Appellants urge this Court to adopt, the Compacts are not legislation. First, the Compacts do not alter the legal rights, duties, and relations of persons subject to the Legislature's power because they apply only to the Tribes. Second, the Legislature acted within its plenary authority to approve the Compacts by resolution, as the Constitution does not require it to act in any other manner. Third, the Compacts do not reflect policy making by the Legislature, as they are the product of negotiations between two sovereign governments.

Since the Compacts are not legislation, they do not violate the local acts provision of the Michigan Constitution, Const 1963, art 4, § 29. The Compacts also do not violate the local acts provision of the Constitution because they apply to a matter of statewide, and not merely local,

concern. In addition, the amendment provisions of the Compacts do not violate the separation of powers provision of the Michigan Constitution, Const 1963, art 3, § 2, because the Compacts delegate only contracting power to the Governor.

STANDARD OF REVIEW

The Circuit Court issued its decision in this case on cross motions for summary disposition. The primary question involved in this case is whether the Legislature's action in approving the Compacts by concurrent resolution was constitutional. GE agrees with TOMAC that this Court reviews summary disposition motions and constitutional questions *de novo*. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003). If the Court finds that the Legislature has acted within its constitutional powers, however, it may not substitute its judgment for that of the Legislature, and must defer to the Legislature's decisions regarding the manner in which it exercises its plenary authority. *See LeRoux v Secretary of State*, 465 Mich 594, 619; 640 NW2d 849 (2002); *Kull v Mich State Apple Comm*, 296 Mich 262, 267; 296 NW2d 250 (1941); *Malisjewski v Geerlings*, 57 Mich App 492, 495; 226 NW2d 534 (1975).

Furthermore, the Legislature is generally presumed to have acted within the scope of its powers. *Doyle v Election Comm of Detroit*, 261 Mich 546, 549; 246 NW 220 (1933). Consequently, TOMAC faces a heavy burden in attempting to demonstrate constitutional impropriety in the Legislature's actions. "The burden of proving an alleged constitutional violation rests on the party asserting it." *Morris v Metriyakool*, 107 Mich App 110, 116-17; 309 NW2d 910 (1981).

ARGUMENT

I. THE UNITED STATES CONSTITUTION AND FEDERAL STATUTES PREEMPT MICHIGAN'S ABILITY TO LEGISLATE WITH RESPECT TO INDIAN GAMING.

A. The United States Constitution Grants the Federal Government Exclusive Jurisdiction Over Relations with the Indian Tribes.

Since this nation's founding, the federal government has been the primary authority in the regulation of relationships with Indian tribes. Pursuant to the first plan of organization of the states, the Articles of Confederation, the Congress was charged with managing Indian affairs, although the states retained some power over the Indian tribes located within their borders. Article IX of the Articles of Confederation stated:

> The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated.

The Articles of Confederation thus provided the centralized government with the authority to regulate relationships with the Indian tribes, and yet limited that power so as not to encroach upon the states' own legislative and regulatory prerogatives.

When it became clear that the loose system of association between the states created by the Articles of Confederation was unworkable, a new federal system was proposed. In its final form, the Indian Commerce Clause, as set forth in US Const, art I, § 8, cl 3, provided:

> [The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Thus, the clause dropped the limitation on Congress' power that had been contained in the Articles of Confederation.

As with many other provisions of the proposed Constitution that granted broad powers to the federal government at the expense of the states, the Indian Commerce Clause drew fire from antifederalists, who favored a weak central government. In defending the provision's merits, the authors of The Federalist Papers argued that the regulation of commerce with the Indian tribes should properly be granted to the centralized federal government, which could apply a uniform policy to the "domestic dependent nations" resident within its borders. *See Oklahoma Tax Comm v Potawatomi Indian Tribe*, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991). In Federalist Number 42, James Madison argued that the relationship between the Indian tribes and the United States was best left to the authority of the federal government without any limitations in favor of the states. Regulation by both the federal government and the states, Madison explained, created a complex and confusing system.

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain. The Federalist No. 42, at 268-69 (James Madison) (Clinton Rossiter ed, 1961) (App at 111b).

The arguments advanced by Madison, John Jay and Alexander Hamilton in defense of the new Constitution succeeded in convincing the people that the federal system of government was

preferable to the loose confederation of states. The Constitution was adopted in 1787, and ratification was completed in 1788.

In 1837, fifty years after the Constitution was adopted, Michigan became a State and was "admitted into the Union on an equal footing with the original States, in all respects whatever." Act of Congress, January 26, 1837, 5 US Stat at Large 144 (App at 113b). The relationship between the State of Michigan and the Indian tribes within its borders is, therefore, subject to control by the federal government pursuant to the Indian Commerce Clause. This Clause makes relations with Indian tribes "the exclusive province of federal law." *County of Oneida v Oneida Indian Nation of NY*, 470 US 226, 234; 105 S Ct 1245; 84 L Ed 2d 169 (1985); S*ee also Seminole Tribe of Florida v Florida*, 517 US 44, 62; 116 S Ct 1114; 134 L Ed 2d 252 (1996) (stating that the Indian Commerce Clause has "divested [the states] of virtually all authority over Indian commerce and Indian tribes").

For over one hundred years, this Court has recognized that Indian tribes are sovereign nations subject to regulation only by the federal government, and generally are not subject to the laws of the State. In 1889, in *Kobogum v Jackson Iron Co*, 76 Mich 498; 43 NW 602 (1889), this Court found that an Indian woman born of a polygamist marriage sanctioned by Indian law could still inherit her father's property, even though polygamy is illegal under Michigan law. In so ruling, this Court stated that "no state laws have any force over Indians in their tribal relations." *Id.* at 507. More than one hundred years later, this fundamental principle remains undisturbed, and Michigan courts continue to recognize that tribal rights are determined by federal law. *See In re Tyler James Elliott*, 218 Mich App 196; 554 NW2d 32 (1996); *see also* MCR 5.980 (recognizing tribal court power in cases subject to the Indian Child Welfare Act, 25 USC 1901 et seq.). Michigan appellate courts also have continued to acknowledge the limits on

state power and jurisdiction resulting from the inherent sovereignty of tribal governments. *See Huron Potawatomi Inc v Stinger*, 227 Mich App 127, 132; 574 NW2d 706 (1998) (holding that Indian tribes have sovereign immunity from suit in Michigan courts, and stating that "state laws are generally not applicable to tribal Indians on an Indian reservation except where Congress has explicitly provided that state law shall apply"). Finally, Michigan's Court Rules recognize the separate jurisdictional power of tribal courts, stating:

> The judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of any court of record in this state, subject to the provisions of this rule. MCR 2.615(A).

Recognition of the State's general lack of authority over Indian matters has been consistently reflected in our jurisprudence and it is clear that it is the federal government that has exclusive jurisdiction over the regulation of Indian tribes. This general principle holds true with respect to tribal gaming activities.

B. The Federal Government Has Provided a Comprehensive System of Federal Regulation of Tribal Gaming.

In its 1997 decision in *California v Cabazon Band of Indians*, 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987), the United States Supreme Court adjudicated the effect of tribal sovereignty and federal primacy in the context of gaming operations conducted by Indian tribes. The Court held that state law is inapplicable to Indian gaming on Indian lands if the state policy toward gaming is regulatory as opposed to prohibitory. *Cabazon*, *supra* at 211, 214. (In other words, a state is powerless to prohibit or regulate Indian gaming if the state's own laws do not entirely prohibit and make criminal all gaming activities. *Id.*) The Court made clear that regulation of Indian gaming is fundamentally the province of federal law, and that the tribes

retain the exclusive right to regulate gaming on their lands in states (like Michigan) that do not criminally prohibit all gaming activities. *Id.* at 207.

In exercise of its federal authority over Indian commerce, Congress then passed IGRA. IGRA provides that Indian tribes may engage in Class III gaming (casino gaming) if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 USC 2710(d)(1)(C). By allowing states to play a role through a compacting process, IGRA "extends to the States a power withheld from them by [the Indian Commerce Clause of] the Constitution." *Seminole Tribe*, *supra* at 58. IGRA does not, however, extend to the states any unilateral power to apply their laws to Indian tribes absent tribal consent. 25 USC 2710(d)(3)(C) (providing that a state and a tribe may agree to apply a state's criminal and civil laws to Indian gaming). *See also, Gaming Corp of America v Dorsey & Whitney*, 88 F3d 536, 546 (CA 8, 1996) (finding that Congress left the states "with no regulatory role" in Indian gaming unless one is negotiated through a compact). Although IGRA does require a tribe seeking to engage in gaming to obtain a compact with a state, IGRA did not contemplate that states would be able to prevent tribal gaming by simply refusing to negotiate or by demanding unreasonable conditions. To guard against such a possibility, IGRA affirmatively requires states to negotiate with tribes "in good faith" to enter into Class III gaming compacts, upon a tribe's request. 25 USC 2710(d)(3)(A). As enacted, IGRA also provides an elaborate system whereby, if a tribe and a state are unable to reach an agreement on a compact, the tribe may sue the state and ultimately the Secretary of the Interior may prescribe regulations to permit Class III gaming on the tribal lands at issue. 25 USC 2710(d)(7)(A)(vii).

As TOMAC states in its Brief at page 35 n20, the United States Supreme Court, in *Seminole Tribe*, held that, despite the terms of IGRA, the states' Eleventh Amendment immunity

from suit protects them from suit by Indian tribes for failure to negotiate in good faith. *Seminole Tribe*, *supra* at 72. Contrary to TOMAC's assertions, however, this decision does not eliminate the states' duty to negotiate with tribes under IGRA nor does it somehow lead to the application of state law to tribal activities. (TOMAC Brief at 36). Instead, *Seminole Tribe* only prohibits a tribe from bringing suit against a state for a failure to negotiate in good faith, eliminating a remedy that otherwise could be invoked against a state that ignores IGRA's mandate to negotiate.[12]

[12] A tribe faced with a state that refuses its federally mandated duty to negotiate a compact may in fact have alternative remedies, such as the Secretary of Interior prescribing regulations pursuant to which the tribe could engage in gaming. While TOMAC argues that this remedy cannot be invoked (TOMAC Brief at 36), TOMAC is unable to point to any case invalidating this remedial approach. Nor has this remedy been foreclosed by the United States Supreme Court, which in *Seminole Tribe* refused to express an opinion as to its validity. *See Seminole Tribe*, *supra* at 76 n18 (stating "We do not here consider, and express no opinion upon, that portion of the decision below that provides a substitute remedy for a tribe bringing suit"). The "Secretarial Procedures" remedy in fact had been suggested by the Eleventh Circuit in *Seminole Tribe*, which had stated:

> [W]e are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02. *Seminole Tribe of Florida v Florida*, 11 F3d 1016, 1029 (CA 11, 1994).

Given this alternative mechanism to provide tribes with the ability to engage in Class III gaming when a state refuses to negotiate in good faith, it is disingenuous for TOMAC to argue that the State in this case had a meaningful option to refuse to negotiate with the Tribes to permit Class III gaming on their lands. (TOMAC Brief at 35-36). Indeed, had the State refused to enter into compacts with the Tribes, the State might have lost the limited opportunity provided to it by IGRA to have some influence over the manner in which the Tribes conduct gaming operations on their lands.

At the same time that TOMAC incorrectly argues that IGRA post-*Seminole* no longer requires states to participate in negotiating tribal-state compacts, TOMAC also argues that IGRA, through 18 USC 1166 (which is part of IGRA), "ensur[es] a meaningful role for state policy in regulating Indian gaming" in a manner that allows a state to in effect unilaterally apply its law to tribal gaming. (TOMAC Brief at 9). This position is wholly without support. A plain reading of 18 USC 1166 demonstrates that it does not in fact give the states a regulatory role in tribal gaming, absent a tribal cession of jurisdiction through a compact. Instead, it confirms again the primacy of federal law. 18 USC 1166, which is selectively and misleadingly quoted by TOMAC, provides in full that:

> (a) Subject to subsection (c), *for purposes of Federal law*, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
>
> (c) For the purpose of this section, the term "gambling" does not include –
>
> (1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
>
> (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.
>
> (d) *The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an*

> *Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior ..., or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.* (emphasis added).

18 USC 1166 in effect "federalizes" state law in the absence of a compact, but it does not give a state enforcement power over violations of state gaming laws on Indian lands. *See United States v EC Investments Inc*, 77 F3d 327, 330-31 (CA 9, 1996) (finding that because 18 USC 1166 "effectively grants the federal government exclusive jurisdiction over California's gambling laws regarding Class III gaming conducted on Indian lands without a Tribal-State compact, California lacks the jurisdiction to prosecute a violation" of its state law on an Indian reservation). Instead, 18 USC 1166 "incorporates state laws as the federal law governing all nonconforming gambling in Indian country," and provides that "the power to enforce these newly incorporated laws rests solely with the United States." *United Keetoowah Band of Cherokee Indians v Oklahoma*, 927 F2d 1170, 1177 (CA 10, 1991).

TOMAC argues that the gaming permitted by the Compacts would be a state crime if the Compacts did not exist. (TOMAC Brief at 19). This is patently incorrect. In fact, "the very structure of IGRA permits assertion of state civil or criminal jurisdiction over Indian gaming only when a tribal-state compact has been reached" that affirmatively extends state jurisdiction to that activity. *United Keetoowah*, *supra* at 1177. Thus, 18 USC 1166 does not, as TOMAC repeatedly claims, confer any state jurisdiction, power or authority over tribal gaming – in fact, it confirms that state jurisdiction may apply only upon a tribe's consent or upon the terms of another federal law. [13]

[13] Neither does *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v United States*, 259 F Supp 2d 783 (WD Wisc 2003), relied upon by amicus Grand Rapids Area Chamber of Commerce ("GRACC"), establish the existence of state authority or jurisdiction over tribal gaming. *Lac Courte Oreilles* simply sustains a power of concurrence given to a state's governor

II. THE COMPACTS ARE NOT "LEGISLATION" AND THEREFORE THE MANNER OF THEIR APPROVAL BY THE LEGISLATURE WAS NOT RESTRICTED BY CONST 1963, ART 4, § 22.

As discussed in Part I of this brief, Congress has the exclusive power to regulate commerce with the Indian tribes and has chosen to exercise that power with respect to gaming through IGRA. While IGRA provides for compacts between states and tribes, and requires states to negotiate for compacts, IGRA does not specify the manner in which a state is to enter into a compact. That issue is left to state law. *See Pueblo of Santa Ana v Kelly*, 104 F3d 1546, 1557-58 (CA 10, 1997) ("IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact.") Since federal law does not dictate the manner in which the Michigan Legislature must approve and enter into tribal-state gaming compacts, one must look to the Michigan Constitution to determine whether there are any restrictions upon the Legislature's ability to enter into compacts with Indian tribes.[14]

In this regard, TOMAC claims that the Legislature is restricted with respect to the manner in which it may approve the Compacts by Article 4, Section 22 of the 1963 Michigan Constitution, which states: "All legislation shall be by bill." The Legislature's method of acting is restricted by Const 1963, art 4, § 22, however, only if the Compacts or their approval are "legislation," which they are not.[15]

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by IGRA in the context of a provision (not at issue here) concerning off-reservation land acquisitions. The case in no way states that IGRA does not preempt a state's right to regulate Indian gaming within its borders, as GRACC suggests. (GRACC Brief at 20-21).

[14] As discussed *infra* at 34-35, the Michigan Constitution is not the source of the Legislature's power, which is the inherent power of the people of Michigan, but is a limitation upon that power. Thus, the relevant inquiry is not whether the Constitution gives the Legislature the power to enter into the Compacts, but rather whether the Constitution in some manner restricts the Legislature's ability to do so.

[15] This Court has specifically instructed the parties to address this issue. (App at 241b).

A. Applying Both The Rule of Common Understanding and Judicial Definitions of "Legislation" Leads to the Conclusion That the Compacts Are Not Legislation.

The requirement that all legislation be created by bill first appeared in the Michigan Constitution in 1908. Const 1908, art 5, § 19. That Constitution provided: "All legislation by the legislature shall be by bill...." Const 1908, art 5, § 19. It also provided that: "Every bill passed by the legislature shall be presented to the governor before it becomes a law...." Const 1908, art 5, § 36. Nothing in the 1908 Constitution suggests that Const 1908, art 5, § 19 prohibited the Legislature from acting by resolution for actions other than enacting legislation. The delegates to the 1961 Constitutional Convention chose to retain the same requirement that all legislation be by bill in the 1963 Constitution. Const 1963, art 4, § 22.

In construing Const 1963, art 4, § 22, and what is meant by the term "legislation," this Court must look to the meaning of the plain language of that provision. This Court applies the "rule of common understanding" when engaging in constitutional analysis, and will inquire as to "the interpretation that ... reasonable minds, the great mass of the people themselves, would give [a constitutional provision]." *Michigan United Conservation Clubs v Dep't of Treasury*, 239 Mich App 70, 84; 608 NW2d 141 (2000), quoting *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). In doing so, "consideration of dictionary definitions is appropriate." *Michigan Road Builders Ass'n v Dep't of Management & Budget*, 197 Mich App 636, 643; 495 NW2d 843 (1993).

Legislation is "the act of making or enacting laws." *Random House Webster's College Dictionary* 759 (2nd ed 2001). Moreover, "law" is defined as "the principles and regulations established by a government or other authority and applicable to a people, whether by legislation or by custom enforced by judicial decision." *Id.* at 752 (emphasis added). In *Black's Law Dictionary*, the term "legislation" is defined as:

> 1. The process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process. – Also termed lawmaking; statute-making. 2. The law so enacted. 3. The whole body of enacted laws. *Black's Law Dictionary* 910 (7th ed 1999).

Additionally, *Black's Law Dictionary* defines the term "positive law" as:

> A system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some nonpolitical community. Positive law typically consists of enacted law – the codes, statutes, and regulations that are applied and enforced in the courts. *Black's Law Dictionary* 1182 (7th ed 1999) (emphasis added).

Applying these definitions to the Compacts makes it clear that the Compacts are not "legislation" under Const 1963, art 4, § 22. The Compacts do not apply "within a particular political community" and are not "applicable to a people," but instead apply to the relationship between political communities – the State and the Tribes. While legislation is unilateral ("positive law" "implemented . . . by political superiors"), the Compacts are not, for all of the reasons set forth in Part I above. Moreover, the purpose of the Compacts, and the legislative approval of the Compacts, is not to govern the conduct of Michigan's citizens, but instead to establish the terms of the relationship between two sovereign powers, the Tribes and the State, with respect to gaming on tribal lands.

In addition to the definitions of "legislation" provided in dictionaries, Michigan courts also have described the nature of legislation. These cases provide a level of detail not found in the dictionary definitions, and further illuminate the meaning of that word. In *Westervelt v Natural Resources Comm*, 402 Mich 412, 440; 263 NW2d 564 (1978), a plurality of this Court stated:

> [T]he concept of "legislation," in its essential sense, is the power to speak on any subject without any specified limitations.

Using this definition of "legislation," it is clear that the Legislature's approval of the Compacts is not legislation, since the Legislature did not have "the power to speak" on the Compacts specifically, or on Indian gaming in general, "without any specified limitations." Instead, the Legislature's power to speak on the subject of Indian gaming has been restricted by IGRA and the need to obtain the consent of the Tribes. IGRA provides the parameters within which a tribal-state compact must be negotiated, and requires the State to negotiate in good faith toward a compact. 25 USC 2710(d)(3). The State cannot prohibit tribes from gaming, since gaming generally is not prohibited in this State, *Cabazon*, *supra* at 211, 214, and cannot unilaterally regulate tribal gaming. *See,* Argument, Part I.

The very nature of the Compacts themselves also places limitations upon the Legislature's power. The Compacts necessarily are the product of negotiations between the State and the Tribes – they are not the unilateral action of the Legislature in setting policy for the State. As this Court has noted, "The exercise of the legislative power requires the consent of no person except those who legislate." *Boerth v Detroit City Gas Co*, 152 Mich 654, 659; 116 NW 628 (1908) (quoting *Indianapolis v Indianapolis Gaslight & Coke Co*, 66 Ind 396, 403 (1879)); *see also Mt. Pleasant v Michigan Consolidated Gas Co*, 325 Mich 501, 513; 39 NW2d 49 (1949). In contrast, the Compacts, like ordinary contracts, require the consent of another party – the Tribes – in order to become effective. *See Rood v General Dynamics Corp*, 444 Mich. 107, 118; 507 N.W.2d 591 (1993) (noting that contracts require mutual assent of the parties).

Furthermore, the Compacts also are not legislation because they do not apply to the people of the State, but rather to the relationship between the State and the Tribes. The United States Supreme Court has repeatedly recognized that legislation "looks to the future and changes existing conditions by making a new rule *to be applied thereafter to all or some part of those*

subject to its power." *District of Columbia Court of Appeals v Feldman*, 460 US 462, 477; 103 S Ct 1303; 75 L Ed 2d 206 (1983) (*quoting Prentis v Atlantic Coast Line Co*, 211 US 210, 226; 29 S Ct 67; 53 L Ed 150 (1908)) (emphasis added). This Court has adopted this definition as recently as 1999. *See Michigan Educational Employees Mutual Insurance Co v Morris*, 460 Mich 180, 196; 596 NW2d 142 (1999). Using this definition, it is clear that the Compacts are not legislation. The Compacts do not affect the rights of citizens of this State, but instead set forth the parameters within which the Tribes agree to operate in establishing and managing gaming facilities.[16] In fact, the Compacts explicitly provide that it is the Tribes, not the State, that are to regulate the conduct of Class III gaming on their lands. The Compacts provide: "Prior to permitting the initiation of any Class III gaming on eligible Indian lands, the Tribe will enact a comprehensive gaming regulatory ordinance governing all aspects of the Tribe's gaming enterprise. The requirements of [the Compacts] are intended to supplement, rather than conflict with the Tribe's ordinance." Compacts § 4(A) (App at 37b). As sovereign nations, the Tribes are not subject to the unilateral power of the States, and the Compacts apply to the Tribes not by virtue of legislative will, but because the Tribes have specifically requested that the State enter into the Compacts, and have negotiated with the State regarding their terms. 25 USC 2710(d)(3). As explained in Part I, the State simply lacks the power to unilaterally subject the Tribe to its dictates. As such, the Compacts are not state legislation. Since the Compacts are not legislation, the Legislature was not required to approve them by bill. Const 1963, art 4, § 22.

[16] While TOMAC suggests that the Compacts affect the rights of the citizens of this State by setting age limitations for gaming or for employment in an Indian casino, TOMAC fails to recognize that these restrictions are restrictions on the Tribes (to which they have agreed), and not restrictions on Michigan's citizens. TOMAC Brief at 20-21. The Compacts state the minimum requirements that the Tribes will use in hiring and in admitting guests to their facilities. Compacts § 4(D), (I) (App at 37b, 39b) The State is given no power to enforce a violation of these rules against an individual, but only inspect the gaming facilities for compliance with the Compacts, and to initiate the dispute resolution procedures provided in the Compacts if a violation is noted. Compacts § 4(M)(6) (App at 41b).

B. The Definition of "Legislation" Found in *Blank v Department of Corrections* Is Inapplicable to This Case.

Instead of looking to the common meaning of the term "legislation" as used in the Constitution and other cases explaining the basic features of legislation, TOMAC looks only to the loose definition of that term found in the plurality decision of this Court in *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000). In *Blank*, the plurality relied upon a description of legislative action contained in the United States Supreme Court's decision in *Immigration & Naturalization Service v Chada*, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1983).

Both *Chada* and *Blank*, however, were very different cases from this one – in terms of the issues presented, the fundamental concerns expressed by the Justices involved, and the underlying constitutional history. *Chada* and *Blank* addressed the issue of whether the Legislature, upon delegating authority to an executive agency, could retain the right to approve or disapprove actions of that agency. *Blank*, *supra* at 113. The plaintiffs in *Blank* challenged such action under Const 1963, art 3, § 2, which provides for the separation of powers of the branches of government. The lead opinion in *Blank* found that the Legislature cannot diminish the authority granted to an agency by state legislation by later conditioning that authority upon non-legislative review of the agency's decisions. *Blank* holds only that once the Legislature grants power to an agency by statutory action, it may subsequently diminish or qualify that power only by further statutory action. The Legislature thus may not authorize a committee of some of its members to evaluate and validate or invalidate administrative rules promulgated under statutorily-granted authority. No such fact pattern or concern is presented in this case.

Beyond this, the legislative veto issue addressed in *Blank* had a significant prior constitutional history. As adopted in 1963, the Michigan Constitution authorized a legislative

veto of agency regulations, on a temporary basis, between legislative sessions. Const 1963, art 4, § 37. The plurality in *Blank* found that this limited authority in the Constitution could not be reconciled with the broad assertion of a permanent legislative veto authority by statute. *Blank, supra* at 119-20. Likewise, in 1984 the Michigan voters rejected a proposal to amend that Constitutional provision and permit essentially the exact type of legislative veto that was at issue in *Blank*. Justice Markman, in particular, found this history – i.e. that the people had rejected an effort to broaden the Constitutional provision limiting the legislative veto to temporary situations between legislative sessions – to be determinative of the outcome in *Blank*. *Id.* at 147-48 (Markman, J, concurring).

This case is distinguishable from *Blank*, however, because the Michigan Constitution is silent as to the proper method for legislative approval of Indian gaming compacts. The voters of this State likewise have not expressed any view on this question. Instead, historical practice in Michigan has been for the Legislature to approve tribal-state compacts by resolution. As such, while the statute at issue in *Blank* was inconsistent with an existing Constitutional provision and the history of failed efforts to change that provision, the approval of tribal-state gaming compacts by legislative resolution suffers no such infirmity.

C. Even if the *Blank* Definition Were Applicable, the Compacts Do Not Meet Its Terms and Are Not Legislation.

In *Blank*, the plurality looked to the following four factor test from *Chada* to determine whether the action of the Legislature at issue in that case was "legislative in nature":

(1) The action has the purpose and effect of altering legal rights, duties and relations of persons outside the legislative branch;

(2) The action supplants legislative action;

(3) The action involves determinations of policy; and

(4) The action is not authorized by the Constitution. *Blank*, *supra* at 114 (citing *Chada*, *supra* at 952-55).

This four part test, while helpful in determining whether an action might be legislation, is not narrowly drawn. For example, the first prong of this test necessarily must apply to "persons outside the legislative branch" who are subject to the authority of the Legislature. *Michigan Educational Employees Mutual Insurance Co*, *supra* at 196. The second prong of the test must apply only to actions that improperly supplant legislative action. *Kelley v Riley*, 417 Mich 119, 197; 332 NW2d 353 (1983) (finding that the Legislature's power is plenary, and that it may act in any manner not inconsistent with the Constitution). The third part of the test should apply only to determinations of policy in areas where the Legislature's power is unrestricted. *Westervelt*, *supra* at 440. The fourth part of the test should apply only in the federal context, where the federal Constitution provides Congress with its power, unlike the state context, where the Michigan Constitution is a limitation on the otherwise plenary power of the Legislature. *Young v Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934). Even applying this test to the Compacts, however, it is clear that the Compacts are not legislation.

1. The Compacts Do Not Alter the Legal Rights, Duties, and Relations of Persons Subject to the Legislature's Power.

As previously indicated, the Compacts do not affect the rights, duties, or relations of persons subject to the Legislature's unilateral power. Instead, the Compacts delineate the parameters within which the Tribes agree that they will operate gaming facilities on their lands. Pursuant to the terms of the Compacts, the State does not obtain any regulatory authority over gaming operations on the Tribes' lands. Compacts § 4 (App at 37b-41b). In fact, the Compacts require the Tribes to post a sign at their gaming facilities providing patrons with notice that the facilities are not regulated by the State. Compacts § 8 (App at 43b-44b).

TOMAC argues that the Compacts are legislation because they permit the State to inspect tribal gaming facilities and records. TOMAC Brief at 27, Compacts § 4(M)(2) (App at 40b). This provision of the Compacts, however, does not obligation the state or any state actor to do anything. The Compacts make clear that it is the Tribes, not the state, that "have responsibility to administer and enforce the regulatory requirements" of the Compacts. Compacts § 4(M)(1) (App at 40b). That the State may inspect the gaming facilities and records of the Tribes is a governmental choice made by the Tribes, not the State. Thus, the Compacts do not impose obligations on those subject to the Legislature's will.

2. The Compacts Do Not Supplant State Legislation.

The Compacts also do not improperly "supplant other legislative methods for reaching the same result." *Blank*, *supra* at 117. As the plurality noted in *Blank*, "not every action resembling legislation requires the passing of a law." *Id.* at 117 n8. In *Blank*, the plurality found that the joint committee's ability to act by resolution to nullify an agency's statutorily granted power was legislative in nature because it was "equivalent to amending or repealing existing legislation." *Id.* (*quoting New Jersey General Assembly v Byrne*, 90 NJ 376, 388; 448 A2d 438 (1982)). In this case, however, the Legislature did not seek to amend or repeal legislation when it approved the Compacts. Instead, it followed its historical course of action by approving the Compacts by resolution, as it had done with the 1993 Compacts.

Moreover, the Compacts do not contain any provisions that would require the passage of a bill. As previously noted, the Legislature engages in legislation where it creates rules of conduct for those subject to its power. *Feldman*, *supra* at 477. In this case, however, the Compacts reflect only negotiations between the State and the Tribes regarding the rules of conduct that the Tribes will observe in their conduct of gaming activities. In fact, the Compacts explicitly state that it is the Tribes, not the State, that are to regulate Class III gaming activities

on Indian lands. Compacts § 4(M)(1) (App at 40b). If the Compacts contained provisions creating rules of conduct for the people of the State, or creating a new state agency, for example, then the Legislature would have to, in addition to expressing its concurrence in the Compacts, enact legislation implementing those provisions of the Compacts requiring changes in State law. In this case, however, the Compacts do not contain such provisions, and the Legislature thus was free to act solely by resolution.

TOMAC attempts to analogize interstate compacts between this State and other states to compacts between this State and the Tribes, and argues that the Legislature should have approved of the Compacts by bill because it has approved of compacts with other states in that manner. (TOMAC Brief at 40.) The Compacts at issue, however, are fundamentally different from interstate compacts. While the Compacts at issue in this case do not create new rules regarding the rights, duties, or relations of persons outside of the Legislature that are subject to its authority, thus requiring legislative action by bill, the interstate compacts do create such rules.[17] Thus, not only is the historical means of approval of interstate compacts irrelevant to gaming compacts, but the difference between the methods of approval is readily explained: all of the interstate compacts do, in some respects, impose obligations on those subject to the Legislature's unilateral power (thus meeting the first prong of the *Blank* test), while the Compacts here do not.

3. The Compacts Do Not Reflect the Unilateral Policy Making by the Legislature That Is the Essence of Legislation.

TOMAC argues that the Compacts are legislative in nature because they make policy choices for the State. Since the Compacts are governed by federal law, are agreements between

[17] *See* Exhibit A for a list of all interstate compacts cited by TOMAC and the manner in which each such compact, unlike the Compacts at issue, does act to bind those subject to the Legislature's unilateral power.

the State and the Tribes that do not reflect policy created by the Legislature on its own, and operate in an area where the State lacks the power to set policy unilaterally for those subject to its power, the Compacts do not make the types of policy choices normally made by legislation.

a. The Compacts Do Not Require Local Units of Government to Create Local Revenue Sharing Boards.

TOMAC argues that the compacts are legislative in nature because they "subject local units of government to a new set of requirements and procedures" and "obligate" local governments to establish local revenue sharing boards. (TOMAC Brief at 28.) Section 18 of the Compacts establishes the criteria and procedures by which the tribal grants to local governments will be disbursed. Compact § 18 (App at 49b-51b). These payments are conditioned upon the establishment of local revenue sharing boards to receive the payments from the Tribes and allocate them among the appropriate local governments in the vicinity of Tribal gaming facilities.

TOMAC fails to recognize, however, that the Compacts do not obligate local units of government to do anything. While the Compacts set forth conditions for receipt of a tribal grant, they do not impose any requirements on local governments. If the local unit of government does not wish to receive the grants, it is not required to establish or participate in the activities of a board. Michigan law expressly authorizes local units of government to accept grants "subject to the conditions, limitations, and requirements provided in the grant, devise, bequest, or other instrument." MCL 123.871. The Compacts simply establish the conditions for receipt of the grant, creating a framework for the distribution of revenues.

b. The Compacts Do Not Contravene State Law Regarding Playing In or Working At a Casino.

TOMAC argues that the Compacts are legislative in nature because they set forth a minimum age for play (18) that is different from the minimum age for play in the Detroit casinos (21), and because the Compacts contain slightly different employment qualifications for casino

employees than the requirements in Michigan law relating to the Detroit casinos.[18] Compact, § 4(I) & 4(D) (App at 39b, 37b); TOMAC Brief at 21-22. Because Michigan law expressly permits casino gaming, IGRA prevents the State from imposing its regulatory requirements, like a minimum age requirement or employment requirements, on the Tribes. As long as Michigan permits gaming, which it does, the manner in which the State regulates its authorized gaming activity is irrelevant to the issues presented in this suit. *Gaming Corp of America v Dorsey & Whitney*, 88 F3d 536, 546 (CA 8, 1996) (finding that Congress left the states "with no regulatory role" in Indian gaming unless one is negotiated through a compact).

TOMAC fails to recognize that the age limitations set forth in the Compacts are part of the regulatory regimes of the Tribes, not the State. The State has no authority to dictate these requirements to the Tribes, which are sovereign governments. As such, the Compacts do not alter State "policy," and do not constitute legislative action. Existing state law regarding gaming is still effective, and is unaffected by the terms of the Compacts. Acknowledgment of the Tribes' sovereign power on their lands, in an area where the State has no power to regulate conduct, is not state legislation.

c. The Compacts Do Not Raise and Spend State Revenue.

TOMAC argues that the Compacts are legislation because they provide for payments by the Tribes of eight percent of their net win from electronic games of chance into the Michigan Strategic Fund ("MSF"). Compacts § 17 (App at 48b-49b). This argument appears to be based, at least in part, on the appropriations clause of the Michigan Constitution, Const 1963, art 9, §

[18] TOMAC fails to recognize that the State permits many other forms of gaming, such as wagering on horse racing, participating in charity gaming, playing bingo, placing a wager at a millionaire party, and purchasing a lottery ticket, by persons who are eighteen years of age or older. *See* MCL 431.317(6) (horse racing); 432.107a(12) (charity gaming); 432.107d(5) (bingo); 432.110a(a) (millionaire parties); and 432.29 (lottery tickets).

17. TOMAC presents this argument for the first time in its Brief on the Merits. As such, this Court should decline to rule on this issue, as "[i]ssues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers Inc v University of Michigan Board of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Additionally, this Court has recognized "a general presumption" that it "will not reach constitutional issues that are not necessary to resolve a case." *Id.* Since TOMAC raises this issue for the first time on appeal, and because the issue raises constitutional questions not necessary to the resolution of this case, this Court should decline to rule on TOMAC's arguments pursuant to the appropriations clause of the Michigan Constitution.

Furthermore, even if this Court does consider this issue, this Court should reject TOMAC's claim. Const 1963, art 9, § 17 states: "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." In this case, however, there is no evidence whatsoever that any funds are paid out of the state treasury pursuant to the Compacts, nor does any provision of the Compacts require such activity.

Moreover, TOMAC's argument has already been properly rejected by Michigan's appellate courts, and this Court should follow that decision. In *Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *lv den* 453 Mich 866 (1996). The Michigan Court of Appeals held that substantially the same provision in the consent decree that preceded the 1993 Compacts is not an appropriation requiring legislative action because:

(1) The revenues are generated by the tribes, and are not paid as a tax or fee;

(2) The state did not concede or give away anything in agreeing to the payments;

(3) The payments are gratuitous payments specifically designated for the MSF, not the state; and

(4) The purpose of the payments is only to create an incentive to preserve the status quo, but not to obligate either the state or the tribes to preserve the status quo. *Id.* at 449-454.

Most importantly, the only payments being made are from the Tribes – not "out of the state treasury." Further, the *Tiger Stadium* court properly found that the payments provided for in the 1993 Compacts were "gratuitous payments specifically designated for the MSF, not for the state," and thus were not subject to Michigan statutory provisions regarding state revenues. *See* MCL 324.1902 (rents or royalties collected for the extraction of non-renewable resources from state lands); MCL 21.161 (gifts or grants to the State); MCL 14.33 (payments of debts or penalties). These same considerations apply to the Compacts at issue in this case, and the payments to the MSF thus do not constitute appropriations requiring legislation.

In attempting in vain to distinguish *Tiger Stadium*, TOMAC argues that the *Tiger Stadium* court did not fully consider whether the 1993 Compacts amounted to "legislation" because *Blank* had not yet been decided. TOMAC Brief at 25-26 n10. As has been previously discussed, however, *Blank* is of little influence on this case.[19] Moreover, the *Tiger Stadium* court clearly held that:

> [B]ecause the revenues are not subject to the Appropriations Clause and are gratuitous payments for a designated purpose, no appropriation was necessary and the Governor did not usurp the Legislature's power in entering into an agreement providing for the payment of the revenues directly to the MSF, and that the Separation of Powers Clause does not require legislative action before the revenues may be spent by the MSF. *Tiger Stadium*, *supra* at 454.

Blank does not change this result.

While the original provisions of the Compacts in this regard therefore are not legislative in nature, the Governor recently has agreed to amend one of the Compacts to indicate that the

[19] Furthermore, the Court of Appeals in *Tiger Stadium* would not have been required to follow *Blank* had it been issued prior to the *Tiger Stadium* decision. "[A] plurality decision in which no majority of the participating justices agree concerning the reasoning is not binding authority under the doctrine of stare decisis." *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995).

Tribes will make the required payments under the Compact "as directed by the Governor or designee." Compact Amendment § 17(C) (TOMAC App at 138a). The Governor has not yet indicated how such payments will be designated. If they are designated to the MSF, or to another similar fund, then the payments would continue to meet the criteria outlined in *Tiger Stadium*. Moreover, the Appropriations clause could not be violated unless and until the funds have been paid out without an appropriation, as the clause directs that funds may be "paid out" by the State only upon an appropriation by the Legislature. Const 1963, art 9, § 17. The clause is not violated by the Governor merely deciding to which fund the Tribes shall make payments of tribal revenues. Finally, issues concerning the specific contents of this amendment are not properly before this Court. Instead, this Court is asked to decide whether the provisions in the Compact that permit the Governor to consent to amendments violates principles of separation of powers. This Court has not been asked to determine whether the contents of this amendment are valid.

d. The Compacts' Geographical Provisions Are The Product of Tribal Agreement.

Lastly, TOMAC argues that the Compacts are legislation because the Tribes agreed to limit the geographic areas within which they will conduct gaming. Compacts § 16(A)(iii) (App at 47b-48b); TOMAC Brief at 28. Like the other Compact provisions, these provisions are the product of negotiations between the Tribes and the State, and reflect an agreement by the Tribes to restrict the geographical scope of their potential gaming activities. This provision does not affect the rights of anyone other than the Tribes, who expressly agreed to this restriction.

4. The Michigan Constitution Does Not Restrict the Power of the Legislature to Approve the Compacts by Resolution.

The fourth factor in the *Chada* definition of "legislation" is the lack of explicit authorization for legislative action in a particular manner. In applying the *Chada* definition to

the facts of *Blank*, the plurality in *Blank* did not analyze this factor. Presumably, this prong of the *Chada* test was omitted in *Blank* because this Court recognized that *Chada* dealt with the federal Constitution, which grants Congress its power (and therefore must authorize Congress to act before that action can be found to be legitimate), while *Blank* dealt with the Michigan Constitution which, conversely, serves as a limitation upon the plenary power of the legislature. As this Court has recognized:

> A different rule of construction applies to the Constitution of the United States than to the Constitution of a state. The federal government is one of delegated powers, and all powers not delegated are reserved to the states or to the people. When the validity of an act of Congress is challenged as unconstitutional, it is necessary to determine whether the power to enact it has been expressly or impliedly delegated to Congress. The legislative power, under the Constitution of a state, is as broad, comprehensive, absolute, and unlimited as that of the Parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the state itself. *Young*, *supra* at 243; *see also Kelley*, *supra* at 197.

As explained below, since the Michigan Constitution does not prevent the Legislature from acting by resolution in approving the Compacts, it may do so. To the extent even relevant, the fourth factor in the *Chada* test thus is satisfied.

III. GIVEN THE MICHIGAN LEGISLATURE'S PLENARY POWERS AND ABILITY TO ACT IN ANY MANNER NOT PROHIBITED BY THE FEDERAL AND MICHIGAN CONSTITUTIONS, THE LEGISLATURE ACTED PROPERLY IN APPROVING THE COMPACTS BY RESOLUTION.

The Michigan Constitution recognizes that political power in Michigan is inherent in the people, whose political power is unlimited. Const 1963, art 1, § 1. As the body that represents the people in their government, the Legislature exercises all of the power of the people, except for that power which is expressly denied it by the people. *Young*, *supra* at 243. This Court, therefore, has recognized that the Legislature "can do anything which it is not prohibited from

doing by the people through the Constitution of the State or of the United States." *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936); *see also In re Request for Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311, 317-18; 254 NW2d 544 (1977) (*citing In re Brewster Street Housing Site*, 291 Mich 313; 332-33; 289 NW 493 (1939)) ("The Michigan Constitution is not a grant of power to the Legislature as is the United States Constitution, but rather, it is a limitation on general legislative power."). The Legislature thus has plenary power, except as its power is restricted by the Federal and Michigan Constitutions, and therefore can approve Compacts by resolution as long as not so restricted.

A. The Michigan Legislature Holds Plenary Power And May Choose the Manner of Its Exercise So Long As Not Restricted by the Constitution.

The power of the Michigan Legislature is plenary. "Unlike the federal constitution, which grants only those powers specifically enumerated, the Michigan Constitution serves as a limitation on the plenary power of the Legislature." *Kelley*, *supra* at 197. The Michigan Legislature thus may exercise its power in any manner not inconsistent with the Michigan Constitution. *Romano v Aten*, 323 Mich 533, 536-37; 35 NW2d 701 (1949) ("The function of a state Constitution is not to legislate in detail, but to generally set limits upon the otherwise plenary powers of the legislature.")

Although the Michigan Constitution sets forth the manner in which the Legislature must act in several instances, no provision of the Michigan Constitution addresses the manner in which the Legislature must approve of tribal-state gaming compacts. In many instances, the Constitution provides that the Legislature must take action in a specific manner. For example, the Constitution provides that the Legislature must approve all legislation by bill (Const 1963, art 4, § 22), must approve the compensation of state officers by concurrent resolution (Const 1963, art 4, § 12), must adjourn by concurrent resolution (Const 1963, art 4, § 13), must keep and

publish a journal of its proceedings (Const 1963, art 4, § 18), must style laws as "The People of the State of Michigan enact" (Const 1963, art 4, § 23), and must appoint an auditor general by a majority vote of the members elected to and serving in each house (Const 1963, art 4, § 53). The Constitution does not, however, require the Legislature to act in any particular manner in approving agreements with Indian tribes. Similarly, no existing provision of state law provides for a procedure by which the State shall approve of gaming compacts.[20] While the Constitution does provide that each house of the Legislature may "determine the rules of its proceedings," Const 1963, art 4, § 16, neither the House nor Senate rules provide for a method of approval of tribal-state gaming compacts.

In the absence of specific provisions in the Michigan Constitution or legislative rules, the Michigan Legislature is free to exercise its plenary authority to approve of the Compacts in any manner of its choosing, including by resolution.[21] As was explained more fully above, the

[20] There have been several legislative proposals seeking to further define the Legislature's role in the compacting process. On December 7, 1988, shortly after Congress enacted IGRA, Senate Bill 1061 was introduced. *See* SB 1061 (1988) (App at 114b-117b). That bill called for the creation of a tribal-state commission to "act on behalf of the state of Michigan in any negotiation of an execution of a tribal-state compact with any Indian Tribe of this state as may be required under the Indian gaming regulatory act." *Id.* The bill was referred to committee, but was not reported out before the Legislature adjourned. In 1998, after Attorney General Opinion No. 6960 was issued, House Bill 5872 was introduced. *See* HB 5872 (1998) (App at 118b-175b). That bill also was not reported out of committee. In 2003, bills were introduced in both the Michigan House and the Michigan Senate providing that tribal-state gaming compacts must be enacted as legislation. *See* SB 452 (2003) (App at 176b-178b); HB 5189 (2003) (App at 179b-182b). Neither bill has moved out of committee.

[21] The business of the Legislature is not conducted solely by bill. In many instances, in fact, the Legislature acts by concurrent resolution where formal legislation is not required. In recent years, for example, the Legislature has acted by concurrent resolution in each of the following situations:

- To convey property to the State Building Authority. SCR 17 to SCR 22 (2001) (App at 183b-215b).
- To change the scope of a state building project. SCR 7 (2001) (App at 216b-224b); HCR 19 (1999) (App at 225b-232b).
- To approve a general form of lease between the State and the State Building

Compacts do not meet the definition of "legislation," and the Legislature therefore has acted within its constitutional authority by approving the Compacts by resolution. The Legislature followed all proper procedures in passing HCR 115. *See* Const 1963, art 4, § 16 (stating that "each house shall ... determine the rules of its proceedings"); Michigan Legislative Handbook, 89th Leg (1997-98), House Rule 76 (App at 87b), Senate Rule 3.802 (App at 81b); *Mason's Manual* § 3(4) ("The provision of the constitution that each house shall have the power to determine the rules of its proceedings is not restricted to the proceedings of the body in ordinary legislative matters, but extends to determinations of propriety and effect of any action taken by the body in the exercise of any power, [and] in the transaction of any business"), § 510(1) ("A majority of the legal votes cast, a quorum being present, is sufficient to carry a proposition unless a larger vote is required by a constitution, charter, or controlling provision of law, and members present but not voting are disregarded in determining whether an action carried.") (App at 89b, 91b).[22]

So long as the Constitution does not limit the Legislature's means of approving the Compacts, this Court may not substitute its judgment as to what manner of acting would have

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Authority. SCR 13 (1997) (App at 233b-240b).

The Legislature has also acted by concurrent resolution to approve amendments to the United States Constitution, and has done so after Michigan's 1908 Constitution established the principle that legislation must be passed by bill. *See, Decher v Vaughn*, 209 Mich 565, 577; 177 NW 388 (1920). These examples demonstrate that the Legislature often acts by concurrent resolution when exercising its power to contract or when otherwise taking action that does not require legislation. TOMAC's arguments to the contrary are unsupported.

[22] The Michigan Constitution provides no procedure for the passage of concurrent resolutions. Where the Constitution is silent, the Legislature itself may determine the means by which its functions may be performed. Const 1963, art 4, § 16. Since the rules of each house that were effective at the time HCR 115 was passed do not indicate the manner in which a resolution may be passed, the rules of *Mason's Manual* will control. *See* House Rule 76, Senate Rule 3.802; *see also Michigan Taxpayers United Inc v Governor*, 236 Mich App 372, 377; 600 NW2d 401 (1999) ("House Rule 76 requires the House to defer to Mason's Manual of Legislative Procedures in matters not addressed by the Michigan Constitution.")

been best for approval of the Compacts for the judgment of the Legislature, and must defer to the Legislature's decisions regarding the manner in which it exercises its plenary authority.[23] *See Kull v Mich State Apple Comm*, 296 Mich 262, 267; 296 NW2d 250 (1941); *Malisjewski v Geerlings*, 57 Mich App 492, 495; 226 NW2d 534 (1975) (holding that the principle of judicial deference to actions of the Legislature applies to activities other than the enactment of statutes). Since 1993, the Legislature has chosen to approve by resolution tribal-state gaming compacts that have been negotiated by the Governor.[24] The methodology of the political branches of government in negotiating and approving these Compacts should be accorded deference by this Court.[25]

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[23] In *Detroit v Circuit Judge of Wayne County*, 79 Mich 384, 387; 44 NW 622, 623 (1890), this Court stated:

> It is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them.

This principle arises from the separation of powers provision of the Michigan Constitution, Const 1963, art 3, § 2.

[24] In its proposed amicus brief, the Sault Ste. Marie Tribe of Chippewa Indians contends that the 1993 Compacts are not subject to the constitutional challenges presented regarding the approval of the 1998 Compacts because (1) the 1993 Compacts were entered into pursuant to a consent judgment; (2) the 1993 Compacts were approved by the number of legislators required to pass a bill; (3) the Attorney General opined in OAG 6960 that approval of later compacts required passage of a bill; and (4) the people of Michigan ratified the 1993 Compacts by passing Proposal E. (Sault Ste. Marie Tribe Brief at 15-17). These arguments are without merit. First, that the 1993 Compacts were related to a consent judgment does not alter the constitutional requirements to which those compacts, like the Compacts at issue in this case, are subject, particularly when, rather than flowing from the consent judgment, approval of the Compacts by resolution was a condition precedent to the consent judgment. (App at 65b). Second, whether the 1993 Compacts passed by a sufficient margin to be approved by bill is irrelevant when in fact they were not passed as a bill. Third, while Attorney General opinions may provide useful explanations of the law, they are not binding upon Michigan courts. *Frey v Dep't of Management & Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987). Finally, if anything, the exceptions in Proposal E, which is codified as the Michigan Gaming Control and Revenue Act, MCL 432.201 to MCL 432.206, for Indian gaming only confirm that it is IGRA, and not state law, that governs the relationship between the tribes and the State.

[25] TOMAC focuses its summary of the events surrounding the Legislature's approval of the Compacts on the fact that HCR 115 was passed by less than a majority of the number of

B. Prior Judicial Decisions Correctly Confirm That the Compacts Were Properly Approved Under Michigan Law.

During the time that Indian gaming compacts have been effective in Michigan, two other challenges involving issues surrounding the compacts have been litigated. *McCartney v Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998); *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996). In both instances, the Court of Appeals implicitly rejected challenges to the compacts, and in both instances this Court denied leave to appeal these decisions. The reasoning and holdings in both *Tiger Stadium* and *McCartney* support the proposition that the Compacts at issue here also were properly concurred in by the Legislature acting by resolution. In keeping with the federal law considerations outlined in Part I.B of this brief, the court in *Tiger Stadium* also recognized that the Tribes' "ability to conduct the gaming activities is a matter of right, not grace." *Tiger Stadium*, *supra* at 451. At a minimum, those cases reflect considered determinations by the Court of Appeals that, under the compacts, which were approved by legislative resolution, Indian gaming is lawful in Michigan. The reasoning of the Court of Appeals in those cases should be adopted by this Court.

While TOMAC dismisses *Tiger Stadium* as irrelevant dicta, *Tiger Stadium* and *McCartney* are the only Michigan decisions that address gaming compacts approved by resolution and that examine the propriety of the Legislature's actions. In *Tiger Stadium*, the

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legislators elected and serving, and that the Legislature could have chosen to approve the Compacts by bill, but did not. (TOMAC Brief at 4-5, 14, 30-31). While GE does not dispute these factual assertions, they are irrelevant to the legal issues presented by this case. TOMAC has not alleged, and cannot demonstrate, that the approval of HCR 115 was procedurally deficient – because it was not. Approval of HCR 115 required only the affirmative vote of a majority of the members present, which it received. *See Mason's Manual* §§ 3(4); 510(1) (App at 89b, 91b). That HCR 115 was not approved by a sufficient number of legislators for it to have passed had it been legislation (i.e. a bill) is irrelevant. The Court's consideration of this case should focus on what the Legislature actually did, "not on what [it] could or could not have done had it tried to accomplish the same objective by another method." *Blank v Dep't of Corrections*, 462 Mich 103, 138 n10; 611 NW2d 530 (2000) (Markman, J, concurring).

plaintiff challenged the Governor's authority to agree to payments by the tribes to governmental units absent an appropriations bill. Not only did the Court of Appeals find that the funds at issue were not subject to the Appropriations clause of the Michigan Constitution, Const 1963, art 9, § 17, as TOMAC suggests (TOMAC Brief at 40-41), but the court also held that the Governor "did not violate the Separation of Powers Clause in negotiating and effectuating the settlement" of the pending case between the tribes and the Governor, because the Legislature had ratified the compacts by concurrent resolution. *Tiger Stadium*, *supra* at 455-56. By finding that the Legislature's approval of the compacts by concurrent resolution thwarted a challenge to the compacts on separation of powers grounds, the Court of Appeals in *Tiger Stadium* implicitly acknowledged that the Compacts are not legislation. In fact, in rejecting the plaintiff's constitutional challenge, the court acknowledged that the Senate had debated whether the compacts could be approved by resolution, but nonetheless stated:

> [H]aving in mind that the Legislature ratified and approved the Governor's actions and the resulting compacts and consent judgment, we reject the argument that the Governor usurped the powers of the Legislature. *Id.* at 456, n 5.

The Court of Appeals thus found that the Legislature's concurrence in the 1993 Compacts by resolution was sufficient to make those compacts effective.

Similarly, in *McCartney*, the Court of Appeals reaffirmed the findings in *Tiger Stadium*, holding that: "[T]he Governor did not usurp legislative power because he did not attempt to bind the Legislature or the state to any terms in the compact. He did not enact legislation or force legislation on the Legislature." *McCartney*, *supra* at 729. *McCartney* involved a claim that certain communications between the Governor and the Attorney General regarding the 1993 Compacts were subject to the Michigan Freedom of Information Act ("FOIA"), and were not exempt from production under the attorney-client privilege exemption of FOIA, MCL

15.243(1)(h), because the Governor had acted outside the scope of his authority in negotiating the compacts with the tribes. In *McCartney*, the Court of Appeals found that the Governor's activities were not *ultra vires*, and noted that "[t]here is no prohibition in Michigan law that would bar the Governor's actions in negotiating a gaming compact and then presenting it to the Legislature." *McCartney*, *supra* at 726. The court also noted that "[t]he Governor is constitutionally authorized to present and recommend legislation." *Id.* Contrary to TOMAC's assertions (TOMAC Brief at 41), the *McCartney* court in no way intimated that the compacts are indeed legislation. Instead, the court merely noted that the Governor is not prohibited from presenting items to the Legislature for approval, and thus is not prohibited from negotiating gaming compacts with Indian tribes, and presenting those compacts to the Legislature for approval.

Both *Tiger Stadium* and *McCartney* properly support the argument that tribal-state gaming compacts entered into pursuant to IGRA are valid under Michigan law upon execution by the Governor and approval of the Legislature by concurrent resolution. This case is no different: the Governor, pursuant to his constitutional authority, negotiated the Compacts with the Tribes, and the Legislature approved the Compacts by concurrent resolution, thus validating them under Michigan law. The manner in which the Legislature approved of the Compacts did not violate the Michigan Constitution.

C. The Compacts Are Contracts, Which May Be Properly Approved by Resolution.

While not legislation, Compacts are contracts. In *Texas v New Mexico*, 482 US 124, 128; 107 S Ct 2279; 96 L Ed 2d 105, 114 (1987), the United States Supreme Court observed that "[a] Compact is, after all, a contract." *See also Pueblo of Santa Ana v Kelly*, 104 F3d 1546, 1556

(CA 10, 1997) (finding that "[a] compact is a form of contract"). Language in IGRA also recognizes that tribal-state gaming compacts are contracts. IGRA, 25 USC 2710(d)(3)(C) states:

> Any Tribal-State compact ... may include provisions relating to –
> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for **breach of contract**;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are directly related to the operation of gaming activities. (emphasis added)

As agreements between two sovereigns that do not bind those subject to the Legislature's unilateral power, the Compacts are intergovernmental contracts rather than legislation. The Compacts themselves recognize:

> [T]he State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation in the interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact. (App at 33b).

Michigan courts have long held that legislative bodies of governments may bind a governmental unit to a contract by resolution, where neither a statute nor the local charter requires any other means. *Case v Saginaw*, 291 Mich 130, 150; 288 NW 357 (1939); *Duggan v Clare Co Bd of Comm'rs*, 203 Mich App 573; 513 NW2d 192 (1994). The same rule applies here where the Legislature has historically, and in the case of these Compacts, bound the State to

the Compacts by approving them by concurrent resolution. *See Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439, 455-56 n 5; 553 NW2d 7. The Court of Appeals in the instant case recognized the historical, and constitutional, practice of the Legislature in approving these Compacts by concurrent resolution, and properly upheld this practice. (App at 22b).

IV. BOTH BECAUSE THEY ARE NOT "LEGISLATION" AND BECAUSE THEY INVOLVE A STATE MATTER, THE COMPACTS ARE NOT LOCAL ACTS UNDER THE MICHIGAN CONSTITUTION.

TOMAC argues that the Compacts are legislation and are local acts subject to the provisions of Const 1963, art 4, § 29 of the Michigan Constitution. This provision provides, in pertinent part:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Const 1963, art 4, § 29.

Since, as discussed *supra*, the Compacts are not "legislation," they cannot be "local acts" subject to this provision. *See Board of Education of the Union School District of the City of Owosso v Goodrich*, 208 Mich 646, 653; 175 NW 1009 (1920) (noting that local acts are "a form of legislation" generally prohibited by the 1908 Constitution, which contains a provision that is nearly identical to Const 1963, art 4, § 29).

Moreover, even assuming, *arguendo*, that the Compacts are legislation potentially subject to the local acts provision, the Compacts still are not local acts. The Compacts are entered into by the State in performing a state function as required under the federal scheme of regulation mandated by IGRA. As such, and in accordance with the holdings of this Court in a long line of cases, the Compacts are not local acts that are prohibited by Const 1963, art 4, § 29. *See People ex rel Schmittdiel v Board of Auditors of Wayne County*, 13 Mich 233 (1865) (legislation

permitting Detroit City Council to require Wayne County to pay a set salary for the City of Detroit's court clerk is not a local act because enforcement of state criminal laws is a State issue); *MacQueen v City Comm of Port Huron*, 194 Mich 328; 160 NW 627 (1916); *Attorney General ex rel Eaves v State Bridge Comm*, 277 Mich 373, 378; 269 NW 388 (1936) (reference to Port Huron in legislation authorizing bridge to Canada does not cause the legislation to be a local act because the subject of the legislation, the bridge to Canada, affects the entire State and the legislation's "only so-called local characteristic is that its American approach is at Port Huron"); *City of Ecorse v Peoples Community Hospital Authority*, 336 Mich 490; 58 NW2d 159 (1953) (legislation that permits the creation of local authorities to develop hospitals is not a local act because the subject matter of the legislation, public health, is an area of statewide concern); *W A Foote Memorial Hospital Inc v City of Jackson Hospital Authority*, 390 Mich 193; 211 NW2d 649 (1973) (noting the same); *Hart v County of Wayne*, 396 Mich 259; 240 NW2d 697 (1976).

In *MacQueen*, which is especially illuminative for this case, this Court found that statutory references to the Detroit Public Schools did not create a local act because legislation involving a state matter, even where that legislation contains a reference to a specific geographic location, is not a local act. The Court stated that:

> Fundamentally, provision for and control of our public school system is a State matter, delegated to and lodged in the State legislature by the Constitution in a separate article entirely distinct from that relating to local government. The general policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers independent of the local government with which, by location and geographical boundaries, they are necessarily closely associated and to a greater or less extent authorized to co-operate. *MacQueen*, *supra* at 336.

Similarly, negotiation and approval of tribal-state compacts is a state matter that was required of the State by IGRA. Furthermore, although the Compacts include references to the geographic areas in which the Tribes may or may not conduct gaming, as discussed above, these references are merely negotiated elements of the Compacts entered into pursuant to IGRA's regulatory scheme, and do not cause a violation of Const 1963, art 4, § 29.

In *Hart*, this Court found that legislation requiring Wayne County to supplement the salaries of recorder's court judges serving within the county was not a local act that is prohibited by Const 1963, art 4, § 29 because the recorder's court is a State court performing a State function. *Hart, supra*. The *Hart* Court refused to apply *Common Council of the City of Detroit v Engel*, 202 Mich 536; 168 NW 462 (1918), which had previously held that legislation limiting the permissible interest rate on school bonds for the Detroit public schools violated the local act prohibition even though the State has primary authority over all matters related to public education. Although the *Hart* Court determined that *Engel* is "'on point' in declaring that a subject of general legislation is not exempted from the local act referendum requirement where the challenged statute pertains to a particular location," the *Hart* Court refused to apply *Engel*, instead holding that the Michigan Constitution does not prohibit references to a particular geographic location when the subject matter of legislation is a statewide issue. *Hart, supra* at 266. Since Indian gaming is clearly a matter of statewide concern, the Compacts are not local acts.

V. BECAUSE THE DELEGATION OF THE POWER TO AGREE TO AMENDMENTS IS TO THE GOVERNOR AND IS NOT WITHOUT LIMIT, THE COMPACTS' AMENDMENT PROCESS DOES NOT VIOLATE THE SEPARATION OF POWERS PROVISION OF THE MICHIGAN CONSTITUTION.

Finally, TOMAC argues that the Compacts violate the separation of powers provision of the Michigan Constitution, Const 1963, art 3, § 2, because the provisions in the Compact

granting the Governor the power to amend the Compacts are not "limited and specific." TOMAC Brief at 43. While the Legislature must set forth specific standards for the exercise of legislative power delegated to an administrative agency, *Blue Cross Blue Shield of Michigan v Governor*, 422 Mich 1, 51-52; 367 NW2d 1 (1985), those same considerations do not apply where the Legislature delegates power to the Governor. (As explained above, the power at issue in this case is not the power to enact "legislation.") In *City Council of Flint v Michigan*, 253 Mich App 378; 655 NW2d 604 (2002), the City argued that the Legislature's delegation of power to the Governor to conduct a hearing regarding the City's financial situation was improper because the Legislature did not establish any procedural requirements for that hearing. In rejecting that argument, the Court of Appeals found:

> Although the Supreme Court has held that the Legislature must provide an administrative agency with standards for the exercise of the power delegated to it, we are not dealing here with an administrative agency; rather, this case involves a decision by the chief executive officer of the state, who stands on an equal level with the Legislature and the judiciary. "The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself." It is further well established that while the Legislature can authorize the exercise of executive power, it cannot place conditions on the exercise of that authority without violating the constitutional principle of separation of powers. *Id.* at 391 (citations omitted).

Thus, in this case the Legislature also was not required to impose detailed standards for the Governor's power to amend the Compacts, since the Legislature specifically delegated this power to the Governor, and not to an executive agency. Furthermore, the terms of the amendment provision do in fact limit the scope of this delegation, as the Compacts do not permit the Governor to agree to amendments to the definition of "eligible Indian lands." Compacts § 16(A)(iii) (App at 47b).

In any event, even if this Court finds that Section 16 of the Compacts violates Const 1963, art 3, § 2, that Section is severable from the Compacts, and the remaining sections of the Compact should "continue in full force and effect." Compacts § 12(E) (App at 45b).

CONCLUSION AND REQUEST FOR RELIEF

GE respectfully requests that this Court find that (1) the Michigan Legislature did not violate Const 1963, art 4, § 22 when it approved of the Compacts by concurrent resolution, because the Compacts are not legislation, and it was within the Legislature's prerogative to approve them in any manner not forbidden by the Constitution; (2) the Compacts do not violate the local acts provision of the Michigan Constitution, Const 1963, art 4, § 29, because they are not legislation, and also are not local in nature; and (3) the Compacts do not violate the separation of powers clause, Const 1963, art 3, § 2, because they do not delegate legislative power to the Governor. The decision of the Court of Appeals therefore should be affirmed.

Respectfully submitted,

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EXHIBIT A

"LEGISLATION" FEATURES OF INTERSTATE COMPACTS

- Michigan, Minnesota, and Wisconsin Boundaries, 1947 PA 267, MCL 2.201. Establishes boundaries between Michigan, Minnesota, and Wisconsin, and thereby alters the extent to which those outside the Legislature are subject to the jurisdiction of each state.

- Midwest Interstate Low-Level Radioactive Waste Compact, 1982 PA 460, MCL 3.751. Creates a Midwest Interstate Low-Level Radioactive Commission to provide sufficient facilities to manage low-level radioactive waste generated within the region. By creating a new entity, affects those outside the Legislature.

- Interstate Agreement on Qualification of Educational Personnel, 1976 PA 68, MCL 388.1371. Provides that school systems in the party states may use teachers or other professional educational persons wherever educated; authorizes a designated state official to enter into a contract with states where he finds that there are programs of education, certification standards or other acceptable qualifications that assure preparation or qualification of educational personnel on a basis sufficiently comparable to his own state.

- Pest Control Compact, 1965 PA 187, MCL 286.501. Establishes the pest control insurance fund, which shall contain moneys appropriated to it by the party states; the insurance fund shall be administered by a governing board and executive committee.

- Great Lakes Basin Compact, 1994 PA 451, MCL 324.32201. Creates an agency of the party states known as The Great Lakes Commission.

- Interstate Agreement on High Speed Intercity Rail Passenger Network, 1979 PA 191, MCL 462.71. Creates an interstate rail passenger advisory council vested with power and duty to coordinate a feasibility study relative to interstate connections.

- Interstate Insurance Receivership Compact, 1996 PA 385, MCL 550.11. Creates the interstate insurance receivership commission vested with power to promulgate rules which shall have the force and effect of statutory law; the members, officers, director, and employees of the commission shall be immune from suit.

- Interstate Compact on Mental Health, 1974 PA 258, MCL 330.1920. Provides the necessary legal basis for the institutionalization or other appropriate care of the mentally ill irrespective of his residence, settlement, or citizenship qualifications; a patient may be transferred to an institution in another state when based upon clinical determinations, the care of the patient would be improved.

- Midwestern Higher Education Compact, 1990 PA 195, MCL 390.1531. Creates a commission, the Midwestern Higher Education Commission, vested with power and duty to study issues of higher education in the Midwest region.

- Multistate Tax Compact, 1969 PA 343, MCL 205.581. Creates the multistate tax commission to study state and local tax systems; if the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing an arbitration article in effect.

- Interstate Compact on Juveniles, 1958 PA 203, MCL 3.701. Provides for interstate cooperation by imposing obligations to supervise delinquent juveniles on probation or parole, to return delinquent juveniles who have escaped or run away from home; the governor of each party state shall designate an officer to promulgate rules and regulations to carry out this compact.

- Interstate Compact on Placement of Children, 1984 PA 114, MCL 3.711. Provides for the placement of children requiring placement into a suitable environment with those persons having appropriate qualifications; the sending state shall retain jurisdiction over the child.

- Interstate Agreement on Detainers, 1961 PA 141, MCL 780.601. Encourages the expeditious and orderly disposition of charges outstanding against a prisoner and determination of the proper status of any and all detainers based on untried indictments, informations or complaints; establishes that any request for final disposition to be made of the indictment, information or complaint by a prisoner shall also be deemed to be a waiver of extradition.

- Tri-State High Speed Rail Line Compact, 1988 PA 230, MCL 462.81. Creates the tri-state high speed rail line advisory commission with the duty to determine the breakdown of both public and private costs involved in the development and construction of the high speed rail line and to determine if an applicant's qualifications are sufficient to develop a high speed rail line between Detroit and Chicago.

- Compact for Education, 1972 PA 359, MCL 388.1301. Creates an education commission vested with the power and duty to analyze information relating to educational needs and resources, and to formulate plans for the improvement of public education.

- Interstate Civil Defense and Disaster Compact, 1953 PA 151, MCL 30.261. Provides for mutual aid among the states in meeting an emergency or disaster and for the payment of compensation and death benefits to injured members of the disaster relief forces in case such members sustain injuries or are killed while rendering aid pursuant to this compact.

- Michigan Military Act, 1967 PA 150, MCL 32.559. Provides that the governor may enter into an agreement with another state authorizing the military forces of this state to be employed within the area of the other states for mutual assistance in the public interest; confers upon a member of the national guard from another state performing support duty in this state the same immunity from liability as has a member of the Michigan national guard in performing support duty.

- Interstate Corrections Compact, 1994 PA 92, MCL 3.981. Provides for the mutual development and execution of programs of cooperation for the confinement, treatment, and rehabilitation of offenders by authorizing contracting with other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states.

- Emergency Management Act, 1976 PA 390, MCL 30.404. Provides that a licensed medical professional or licensed hospital that renders service during a state of disaster declared by the governor is considered an authorized disaster relief worker or facility and is not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained.

- Interstate Compact for Conservation of Oil and Gas, 1994 PA 451, MCL 324.62101. Creates an interstate oil compact commission vested with power ansd duty to inquire into the methods, practices and circumstances for bringing about conservation and the prevention of physical waste of oil and gas.

- Highway Reciprocity Board, 1960 PA 124, MCL 3.163. Provides that before any owner or operator may become entitled to the privileges and exemptions of the compacts, the person first must have his vehicle or vehicles properly registered under the laws of the jurisdiction which the board determines to be proper for his vehicles.

- Interstate Compact; Prevention of Crime, 1935 PA 89, MCL 798.103. Grants the governor the administrative power and authority if and when conditions of crime make it necessary to bind the state in a cooperative effort to reduce crime.

- Interstate Compact; Probation and Parole, 1935 PA 89, MCL 798.101. Permits a person convicted of an offense within a sending state who is placed on probation or released on parole to reside in a receiving state provided that the person is a resident of the receiving state or the receiving state consents to the person being sent there; officers of a sending state given power to enter a receiving state and retake any person on probation or parole whereby all legal requirements to obtain extradition or fugitives from justice are hereby expressly waived.

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